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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

- - - - - X
MICHAEL J. DAVIS, ET AL.,) 01-CV-6492(L)
Plaintiffs)
)
vs.)
) Rochester, New York
J.P. MORGAN CHASE, ET AL.,) February 15, 2011
Defendants.) 10:00 a.m.
- - - - - X

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

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1 P R O C E E D I N G S

2 * * *

3 THE COURT: Good morning, all.

4 MR. SHAULSON: Good morning, Your Honor.

10:14AM 5 MR. THOMAS: Good morning.

6 THE COURT: This is Davis vs. JP Morgan Chase, et al.

7 Could we have cast of characters here? Mr. Thomas we
8 know. Anybody on the line here that's listening?

9 THE CLERK: No, no one is on the phone today.

10:14AM 10 THE COURT: All right. Mr. Thomas is here for
11 plaintiffs.

12 MR. SHAULSON: Good morning, Your Honor, Sam Shaulson for
13 the defendants.

14 THE COURT: Good morning.

10:14AM 15 MR. SHAULSON: Good morning.

16 THE COURT: Mr. Smith is here, I see.

17 MR. SMITH: Yes, Your Honor. Jules Smith from Blitman &
18 King on behalf of the Cole plaintiffs. With me is Zach Dostart
19 also on behalf of the Cole plaintiffs.

10:14AM 20 Do you want to state your name, Zach?

21 MR. DOSTART: Zach Dostart on behalf of the Cole
22 plaintiffs from Dostart Clapp Gordon & Coveney.

23 THE COURT: Tell me your name again.

24 MR. DOSTART: Zach Dostart, D-O-S-T-A-R-T. Thank you,
10:15AM 25 Your Honor.

1 THE COURT: I did receive a letter from Mr. Swartz, who
2 apparently represents the *Pickle* case in the Southern District.
3 Not here I guess? Okay.

4 Well, what often is a rather pro forma proceeding, that
10:15AM 5 is, approving preliminary order of settlement, turns out perhaps
6 not to be such here. There tends to be sort of an automatic
7 scheduling process when both sides notify the Court that they have
8 reached a settlement and they want to put the preliminary approval
9 on and schedule dates for, ultimately, the fairness hearing, it's
10:16AM 10 something that gets arranged pretty quickly.

11 In this case, I think the pending motions to intervene
12 were not really focused on when we did that. So I guess I have
13 several questions as to what to do at this stage, and I'd be happy
14 to hear from -- I don't know if Mr. Smith or Mr. Dostart is going
10:17AM 15 to carry the rowing oar relative to these issues or --

16 MR. SMITH: Your Honor, I thought -- we thought that I
17 would take the major oar. Mr. Dostart is prepared to speak on the
18 peculiarities related to the California statutes that have an
19 impact on the reasons why we believe this proposed settlement
10:17AM 20 should not be approved.

21 THE COURT: Well, I'll hear all three, and I think
22 there's sort of some competing interests here obviously.

23 In the objection to the motion to intervene, among other
24 factors advanced by the plaintiffs, was the fact that certainly
10:17AM 25 when the motion to intervene was made, I think arguably even now

1 plaintiffs would suggest that the things about which you complain
2 can be dealt with at the ultimate fairness hearing, that that's
3 the time to deal with these.

4 So I guess that's sort of the first issue I have is I
10:18AM 5 sort of put it under the category of standing as to whether
6 anybody, whether it's a proposed to intervene order or a potential
7 class member, which I guess is what you purport to represent or
8 who you purport to represent, whether you really have much to say
9 at this stage -- that is, the preliminary approval stage --
10:18AM 10 without prejudice certainly to whatever submissions might be made
11 at the ultimate fairness hearing where everybody has a right to be
12 heard sort of related to that.

13 In this posture now, is it really necessary to deal with
14 the motions to intervene? The plaintiffs suggested in their
10:19AM 15 opposing papers in the motion to intervene that the applications
16 were premature then because you really didn't know what the
17 settlement was, the terms and so forth.

18 Well, now all that presumably is before us, so
19 plaintiffs suggest and I am wondering if it's not the case that
10:19AM 20 intervention really isn't necessary, if you have full rights to
21 suggest to the Court whatever you want to suggest before the Court
22 finally approves it.

23 And just before I stop talking and let you go, I think
24 it was the plaintiffs' -- either affidavits or memo -- where it
10:20AM 25 was suggested that the multi-district panel, in denying apparently

1 the application to consolidate, referenced the fact that the folks
2 who sought consolidation could raise their objections in a
3 fairness hearing before me. That was specific -- I was
4 specifically mentioned. It's always nice to be specifically
10:20AM 5 mentioned. So even the multi-district panel seemed to suggest
6 that the fairness hearing was a place to do this.

7 So unless you have a better idea -- well, I'll say one
8 more thing, if I could, and then I will promise to let you.

9 Mr. Swartz, S-W-A-R-T-Z, who purports to represent the
10:21AM 10 *Pickle* plaintiffs, an action in the Southern District, said in his
11 letter, which appears to have been copied to all of you --

12 MR. SMITH: Yes, it was, Your Honor. It was filed, so we
13 all received it.

14 THE COURT: Yes, it was filed yesterday, the 14th. He
10:21AM 15 raises some issues about the notice which, of course, is one of
16 the things the Court has to do as far as the preliminary approval.

17 So at least as to the notice, that would seem to be
18 something that maybe people other than the parties have some
19 interest in. And the Court, if the matter is provided for me --

10:22AM 20 for approval, of course, the Court has to decide whether the
21 notice is appropriate and maybe folks represented by Mr. Smith and
22 Mr. Swartz should have some input into that. Maybe not.

23 So I call it "standing." Maybe that's not the correct
24 word, but, you know, the process envisions preliminary order of
10:22AM 25 approval, notice sent out, and time for people to object, opt-in

1 to raise objections.

2 So I'm not sure we can do everything today, and I guess
3 my first question is should I even hear Mr. Smith and his folks?

4 Mr. Thomas, why don't you go first?

10:22AM 5 MR. THOMAS: Thank you, Judge. First, I think it's -- if
6 you don't mind, I'd just like to take a step back here a little
7 bit in terms of this case.

8 Sam Shaulson and I have been litigating -- or our
9 respective firms have been litigating this case since 2001.

10:23AM 10 THE COURT: Has have I.

11 MR. THOMAS: As have you, Your Honor. And in that time
12 none of these people appeared until last year because -- and they
13 appeared shortly after the Supreme Court -- as you know, we
14 litigated the case, we had multiple motions in front of Your
10:23AM 15 Honor, we conducted --

16 THE COURT: Copy cat actions.

17 MR. THOMAS: Copy cat actions is what's going on here,
18 they're jumping in after the Supreme Court denied cert. and
19 suddenly these people pop up.

10:23AM 20 I'm not saying that at the proper point in this
21 procedure they can't have -- they can't make objections. We
22 believe they should be able to make objections at the right point.
23 In this litigation, the MDL panel has ruled when the appropriate
24 time to make those objections are.

10:24AM 25 And the letters -- I agree with Your Honor, the point

1 Your Honor made: The letters read like objections to the
2 settlement.

3 And this is simply a procedural issue as to when we do
4 that. Are we going to go over that today, or are we going to go
10:24AM 5 over that when it's time for final approval and people have a
6 chance to opt-out?

7 I think the proper time for that is at the time of
8 approval when there's a chance for people to opt-out, put in all
9 their objections. The reason for that is many-fold.

10:24AM 10 One is preliminary approval is not the stage to do that.
11 As everyone agrees, the only question is, is this a settlement
12 within the range of potential approval? This is a \$42 million
13 non-reversionary settlement that is providing thousands of dollars
14 for class members.

10:24AM 15 This is not a case, you know, where there's some sort of
16 anomalous settlement or there appears to be anything on the
17 surface that's wrong with it. They raise more subtle issues which
18 can be teased out at the final stage, but not now.

19 But I also think from a due process perspective, it's
10:25AM 20 important to get the notice out. There are at least two other law
21 firms out there who also have copy cat litigation going on and
22 there's obviously --

23 THE COURT: Two more besides these?

24 MR. THOMAS: These two, correct. And there's also --

10:25AM 25 THE COURT: I'm sorry, let me just -- two more in

1 addition to the *Cole* and *Pickle* actions?

2 MR. THOMAS: There's two different law firms. I believe
3 one of them is in the *Pickle* action; another one is separate. Am
4 I getting that right?

10:25AM 5 MR. SHAULSON: There are in addition to *Pickle* and *Cole*,
6 there are two other actions that purport to bring claims on behalf
7 of Chase underwriters. The *Ebert* action, which is located in
8 Texas; and another California action which has been brought by
9 Dostart Clapp, which is the firm that Zach is here representing.

10:25AM 10 MR. THOMAS: This goes to show there's other people out
11 there and, in fact, of course, there's putative class members.

12 It serves everyone's interest that those objections be
13 heard at one time in one forum and nobody gets a jump start on
14 this, no one tries to -- no one tries to put in some objections
10:26AM 15 now and have them partially ruled on without an opportunity for
16 people to be heard.

17 So the rules envision there's a proper time for those
18 objections, and that's later. I understand they're saying they're
19 going to object at that point. That's their right. But at this
10:26AM 20 point that's not what we're here for, which is preliminary
21 approval.

22 I also do think there's serious issues about standing
23 and the ability to even object --

24 THE COURT: At this stage.

10:26AM 25 MR. THOMAS: -- at this stage. Later there's no issues,

1 and I think to the degree there's a belt-and-suspenders approach
2 from them, listen, we want to make sure they're going to hear
3 objections, at this stage we want to get in on it. Understood.

4 But that's not --

10:26AM

5 THE COURT: Well, their right to be heard at the fairness
6 hearing is because they represent purported class members?

7 MR. THOMAS: Correct. And that's -- if they represent
8 people -- and who knows, they may choose to opt-out. If they
9 opt-out, they won't be there.

10:27AM

10 There's lots of things that need to happen between now
11 and then, and now's just not the time. The part of the -- and the
12 other thing with it is not only this copy cat litigation, this has
13 already been litigated, if this case had gone to the MDL panel and
14 the case had been consolidated with Your Honor or some other

10:27AM

15 judge, then of course everybody would need to be a part of this
16 process.

17 But the MDL panel has already ruled the proper procedure
18 for this is for them to object as the rules specify when the time
19 for objections is to be heard when everything can be given careful
20 consideration.

10:27AM

21 THE COURT: Was anybody before the MDL panel besides the
22 *Cole* and *Pickle* people?

23 MR. THOMAS: *Ebert* was as well, and I believe --

24 MR. SHAULSON: *Ebert* had submitted papers that weren't as
25 active as some other counsel were, but they were before the panel.

10:27AM

1 So, yes, all counsel in the constituent copy cat cases were before
2 the MDL panel.

3 THE COURT: All right.

4 MR. THOMAS: I think, Your Honor, there are serious due
10:28AM 5 process problems with hearing objections and making a
6 determination on objections piecemeal without everyone being
7 present, without a complete record at a premature point in the
8 proceedings.

9 In terms of the notice, I think the only objection here
10:28AM 10 that relates to the notice is whether the other actions should be
11 mentioned. They shouldn't be for a couple of reasons.

12 One primarily is because under the MDL panel's decision,
13 they're not consolidated. These aren't the same cases. And the
14 appropriate time, as another court has already opined, the
10:28AM 15 appropriate time for those objections to come in is not now, but
16 later.

17 Second of all, these other cases, because they are copy
18 cat, follow-on litigation, they all basically stay in suspended
19 animation with virtually nothing having happened in them.
10:28AM 20 Therefore, I don't know that it really does anybody any good to go
21 find out that there's been a complaint filed elsewhere.

22 Again, there will be plenty of time for that to happen
23 in the objection process, but it's important that everyone be on
24 the same page, everyone from a due process perspective, and from a
10:29AM 25 procedural perspective receive notice and know what they can do,

1 and now is not the time.

2 This issue has been litigated. Now's not the time to go
3 over this. This notice of \$42 million settlement should go out to
4 folks so they know what's going on, then we can be back in front
10:29AM 5 of your Your Honor and everyone will have the right to put forth
6 their positions.

7 THE COURT: The notice is, and the nature of the notice
8 is something that's often litigated and it seems to me that's a
9 not insignificant thing.

10:29AM 10 Mr. Swartz in his letter cites a case which -- two
11 cases, I guess, which purport to approve a District Court's
12 issuance of a notice that did contain references to two other
13 actions. Now, I haven't had time really to research the issue to
14 any extent, and you haven't had time to respond, but --

10:30AM 15 MR. SHAULSON: Your Honor, I can certainly address that
16 if you wanted me to.

17 THE COURT: Well, I guess I'm just wondering if it makes
18 some sense to have everybody -- if you can't agree on the notice,
19 to have everybody submit something to me in a short period to
10:30AM 20 assist the Court in deciding whether the notice should be as the
21 parties have agreed, or contain some additional provisions.

22 Because I think it's probably -- let me just -- I mean,
23 it's probably to the benefit of everybody that the notice be
24 complete and not subject to later attack.

10:30AM 25 What's your reaction to that?

1 MR. THOMAS: Your Honor, there have already been --
2 there's been extensive letters and things that came into this
3 Court on this issue. They've examined this agreement very
4 carefully. I am confident if they had any problems with the
10:31AM 5 notice, other than mentioning their actions, we would have heard
6 of it. We heard just about everything else, so I don't know
7 there's really --

8 THE COURT: You say you've heard "everything else." I
9 mean, the proposed settlement was filed, like, a day ago, and the
10:31AM 10 letters I got yesterday.

11 So it doesn't seem to be a great length of time for
12 folks to consider this unless the proposed settlement was
13 submitted to people before it came here.

14 MR. THOMAS: My point is, though, they responded to --
10:31AM 15 they attacked what was submitted to you on a number of fronts and
16 there was only one issue with the notice. I assume if there was
17 problems with the notice, they would have focused on those because
18 that is the only really appropriate thing to be focusing on at
19 this stage of litigation, and the only issue is whether the other
10:31AM 20 litigation should be mentioned.

21 THE COURT: I will ask Mr. Smith when you're through as
22 to why that's important, but I'll let you finish.

23 MR. THOMAS: Yes. So I don't think there's -- I mean,
24 we've been over this, this follows the FJC guidance in terms of
10:32AM 25 what should be in there. I don't think the other cases are

1 important, and that's the only issue we have that's been raised in
2 terms of notice.

3 I also think it is not appropriate to vet the notice
4 with multiple counsel in related actions. If every notice that
10:32AM 5 was sent out in a class action settlement you had to go out and
6 find people who might be interested in the notice and get their
7 opinions on it, it would really frustrate the settlement process.

8 THE COURT: We don't have to go looking, they've sort of
9 come here.

10:32AM 10 MR. THOMAS: But the point is should only they be heard?
11 And why should they be heard? Because they sent in a letter?
12 And, again, send in a letter not challenging the notice.

13 So I don't know that sending in letters not challenging
14 the notice entitles them to spend time going over the notice. I
10:32AM 15 think it's just -- there's nothing wrong with the notice -- again,
16 leaving aside, which I think is fine to do -- the issue of the
17 cases, there's nothing wrong with the notice.

18 They don't -- it barely sets forth what the settlement
19 is. They just don't like it or they claim they may not like it
10:33AM 20 now. I just don't know there's -- given the fact there's not
21 issues with it, that that need to be rehashed.

22 THE COURT: I take it from your comments that you both
23 are not willing to make the change in the notice to notify folks
24 that there are these other actions pending?

10:33AM 25 MR. SHAULSON: Judge, can I just address that point?

1 THE COURT: Either one of you.

2 MR. SHAULSON: There are two cases that are cited by
3 Mr. Swartz in his letter. The *Wal-Mart* case, which approved the
4 settlement despite the fact that other pending litigations were
10:33AM 5 not mentioned in the notice.

6 While they did have a footnote on the point, the Court
7 said the fact that the release was cited and quoted in the notice
8 was absolutely sufficient.

9 What's distinguishable about *Wal-Mart* from this case is
10:34AM 10 that in none of the other actions in this case has there been a
11 certified class. There was a certified class in the *Wal-Mart*
12 case, so it would be -- it would make sense to notify individuals
13 who already received notice that their claims in that case that
14 they've received notice about were going to be extinguished.

10:34AM 15 That's not the case here, so there's no necessity to
16 advise class members about some case they've never heard of. All
17 it would do is create confusion.

18 So it's actually against the class members' interest to
19 provide them notice of another case that they've never heard of,
10:34AM 20 only to confuse them.

21 THE COURT: Because *Pickle*, *Cole* or *Ebert* haven't been
22 certified as a collective or a class action?

23 MR. SHAULSON: Correct. And the other case he cites, the
24 *Churchill* case, doesn't say anything about the appropriateness of
10:34AM 25 providing notice of other related actions. All it does is mention

1 that, in fact, a notice had been sent that contained that
2 information. It doesn't endorse that principle at all.

3 THE COURT: Well, this was sent to us at 9 o'clock last
4 night and I have not done the research that you apparently have
10:35AM 5 done, so....

6 But I guess Mr. Swartz, in submitting the letter to me,
7 is not here to speak for himself, but requested in his final
8 paragraph that I postpone the hearing. And if so, that he on
9 behalf of his folks want to supplement his letter by further
10:35AM 10 submissions.

11 And the only thing he did mention in that paragraph
12 about the notice was if I decided to forge ahead, that I do direct
13 that the notice contain references to these other lawsuits. There
14 didn't appear to be -- at least in his two-page letter -- anything
10:36AM 15 else that he found to be untoward about the notice.

16 MR. SHAULSON: And why, Judge, would an objector class
17 counsel filing a copy cat action want to provide notice of their
18 own action? So that they could solicit objectors and solicit
19 opt-outs, which is not the business of the Court.

10:36AM 20 The Court shouldn't be -- if the Court approves the
21 settlement as fair, it shouldn't be in the business of soliciting
22 objectors or opt-outs for class counsel who have an ulterior
23 interest.

24 THE COURT: No, the Court's obligation is to make sure
10:36AM 25 that class members are fully apprised of what's being suggested

1 here so they can exercise their rights, whether that means to get
2 in or to get out.

3 I guess, Mr. Smith, I would be interested as to why
4 telling potential people that there's some lawsuit in California
10:36AM 5 and Texas and down in New York City, why that's of any moment?

6 MR. SMITH: Because their substantial rights are being
7 affected by this settlement. The fact that --

8 THE COURT: But that's -- I'm sorry for interrupting, but
9 that's true regardless of whether you notify them that there are
10:37AM 10 other actions pending.

11 I mean, why -- I think Mr. Shaulson's suggestion that it
12 could cause confusion I think makes some sense. Telling them
13 there are another three actions, what are they supposed to do with
14 that? They got no notice about those actions, they don't know
10:37AM 15 anything about it.

16 Go ahead.

17 MR. SMITH: Well, Your Honor, first of all, let me step
18 back for a minute. There are substantial rights being litigated
19 in these other forums. There's no ulterior motive other than --

10:37AM 20 THE COURT: They sound very similar to what's being
21 litigated here.

22 MR. SMITH: They are very similar to what's being
23 litigated here. There are some substantial differences, but there
24 are substantial rights that are being affected by this case.

10:38AM 25 THE COURT: Let me interrupt you, and I'm sorry I keep --

1 a perk judges have is to be able to interrupt people, until we get
2 home.

3 I lost my train of thought. Oh, the proposed
4 settlement, as far as I know, was just disclosed Thursday or
10:38AM 5 Friday, so --

6 MR. SMITH: Friday night.

7 THE COURT: -- I wonder if everybody's had enough time to
8 really digest that to see if there are really substantive problems
9 that really do affect adversely people litigating in California
10:38AM 10 and Texas and the City?

11 MR. SMITH: Your Honor, that really is our major thrust.
12 We have been trying for a period of time to get information about
13 what was going on with this case.

14 Friday night at 9 p.m. is when the settlement agreement
10:38AM 15 was filed, although it did not include all of the schedules that
16 were alluded to, which were filed last night.

17 This train is moving very quickly and counsel are
18 scrambling to try to slow things up so that we can fully analyze
19 the settlement and make appropriate responses.

10:39AM 20 We have noticed in the short period of time some very
21 substantial problems with the substantive provisions of the
22 settlement agreement. I think it's appropriate for Your Honor to
23 consider those, you know, I think we should be -- we have a
24 substantial right to participate, and we fully briefed that in
10:39AM 25 terms of intervention, but certainly I think it's appropriate to

1 hear counsel for these other cases to assist in moving this
2 process forward.

3 Some of the concerns that we noted that Your Honor even
4 pointed out, without finishing the next -- what we think is the
10:40AM 5 next sentence is that, yes, the primary purpose at this point,
6 Your Honor, or one of the primary purposes is to assure that the
7 proposed settlement is in the range of what would be reasonable,
8 what could be approved.

9 Given the record, I don't think that's possible because
10:40AM 10 nobody knows -- there's nothing that discloses what is the total
11 exposure of Chase. And that becomes even of more concern because
12 of a substantial difference in the *Cole* case from this case, which
13 are the state law claims which will be released. Those claims
14 haven't been -- although they will be released, they have not been
10:40AM 15 litigated in this case. We don't know what their value is.

16 They include, for instance, Your Honor, wage claims
17 under a very favorable state statute for these -- for the
18 California plaintiffs. It includes meal and rest period claims
19 under the California law, which can be extremely costly. It
10:41AM 20 includes business expenses that the California statute requires to
21 be reimbursed.

22 THE COURT: I take it from your comments that's just sort
23 of preface to what you want to raise in a couple of months. You
24 don't suggest I have to deal with that now, do you?

10:41AM 25 MR. SMITH: What I'm suggesting, Your Honor, is that if

1 this settlement, this proposed settlement and the approval process
2 continues, by the time we get to the fairness hearing this egg is
3 going to be so scrambled that it's going to be extremely difficult
4 to go back and fix it.

10:41AM 5 I don't know how, without these issues being dealt with
6 now, how there's going to be a -- how this is ultimately going to
7 be approved.

8 THE COURT: This happens in every case where there's a
9 preliminary approval and then it goes out to be commented on,
10:42AM 10 whether it's a month from now or two months or three months or
11 five months.

12 I mean, the Court, if it decides additional time is
13 necessary for individuals to weigh in, that's sort of standard.

14 MR. SMITH: That's true, Your Honor.

10:42AM 15 THE COURT: The train is moving, but it's not moving at
16 the lightening speed you suggest.

17 MR. SMITH: Well, we got papers 9 o'clock on Friday night
18 for an appearance Tuesday in Rochester. Those wheels of justice
19 are moving quickly.

10:42AM 20 But my point is, Your Honor, we believe that this
21 proposed settlement is fatally flawed. We don't think, Your
22 Honor, that it can be moved forward for some of the reasons that
23 we proposed now.

24 Even if we're not here as intervenors, certainly, Your
10:42AM 25 Honor, bringing this forward to the Court as an amicus we think is

1 appropriate and we would like, and Mr. Swartz would like, and I
2 believe the counsel in the other cases would like the opportunity
3 to submit to Your Honor the very important concerns that we
4 raised.

10:43AM

5 There's substantial law to the effect, for instance,
6 that you can't waive claims that weren't litigated, and that's one
7 of the things that's being waived here by the release.

10:43AM

8 THE COURT: Well, the problem is that I have two people
9 standing before me who litigated this case for a decade, the
10 plaintiff and the attorneys for the bank.

10:44AM

11 You know, the history of this litigation is well-known
12 to all. They both think, presumably after arm's length
13 discussion, experience counsel on both sides, that this is a good
14 deal. Obviously the rules require that their say so isn't enough;
15 that the Court has to decide that.

10:44AM

16 So everything you're telling me, it just seems like it's
17 not grist for today; it's something we do tomorrow --
18 metaphorically tomorrow, in the future -- without prejudice.
19 But -- and I don't think Mr. Thomas suggests that anything you've
20 just said can't be broached at a later time.

21 So I don't --

10:44AM

22 MR. SMITH: Well, part of the problem, Your Honor, is
23 that without some of this missing information or that dealing with
24 some of the questions that I've raised, if this proposed
25 settlement goes out in this forum, and the notice to the class

1 members goes out summarizing it, the class members will not have
2 adequate information to determine whether they should opt-in or
3 not. That's a very basic problem.

4 THE COURT: You say that, but there may be a whole bunch
10:45AM 5 of them that are quite comfortable with the notice they get and
6 elect to proceed or decline to opt-out.

7 MR. SMITH: They may be comfortable with the notice
8 because of what's missing in the notice which is, for instance,
9 what is the total exposure that Chase has.

10:45AM 10 THE COURT: You mean how much money do they have or --
11 what's that mean?

12 MR. SMITH: How much money would mean -- less than they
13 did yesterday. That means what is the exposure under this
14 lawsuit? What are the claims? Is their exposure \$50 million? Is
10:45AM 15 it \$100 million? Is it \$200 million?

16 That would seem to me to be an important factor for
17 class members to evaluate when determining whether they're
18 settling. They might look at it and say, well, yeah, their
19 exposure is five times what they're settling, but there are these
10:46AM 20 factors that convince me that's appropriate.

21 They might also look at it and say, well, wait a minute.
22 I'm getting 10 cents on the dollar, that doesn't seem appropriate.

23 THE COURT: Well, so they opt-out.

24 MR. SHAULSON: That's certainly not required, Your Honor,
10:46AM 25 and I would defy counsel to provide settlements that they have

1 entered into which sets forth the total exposure in the notice.
2 I've never seen one.

3 THE COURT: If you mean "exposure," if you're talking
4 about the strength or weaknesses of the case, I think most
10:46AM 5 settlements discuss that that, you know, there are issues that
6 speak in favor of plaintiff, but there are possible defenses and
7 the cost of litigation. I mean, all that is pretty standard fare
8 for advising plaintiffs of the risk factor here.

9 So I don't think this case is any different in that
10:46AM 10 regard than many of the other cases I've had, and I don't know --

11 MR. SMITH: Your Honor, I just point out --

12 THE COURT: Let me just --

13 MR. SMITH: I'm sorry.

14 THE COURT: -- before I forget the thought. I don't know
10:47AM 15 how many folks are in the *Cole* action or the *Pickle* action,
16 whether -- if that's even been determined yet, how many opt-ins or
17 named plaintiffs there are in those cases. Maybe it doesn't
18 matter.

19 I mean, this case, the case before me, I suspect is
10:47AM 20 pretty well-known and publicized among employees of the bank
21 because it has been litigated. I think the original understanding
22 was maybe they would pick a test -- I think it was pitched to me
23 as sort of a test case, and the Court made its summary judgment
24 motion ruling and the Circuit, of course, disagreed and sent it
10:47AM 25 back and here we are.

1 Well, Mr. Smith, assuming that the Court does what
2 Mr. Thomas, and I think Mr. Shaulson, agree should be done and
3 that is to allow class members either individually or through
4 counsel to object at the fairness hearing, is there any need for
10:48AM 5 the Court to resolve the motions to intervene?

6 MR. SMITH: Well, Your Honor --

7 THE COURT: Let me just finish the thought.

8 MR. SMITH: I'm sorry.

9 THE COURT: Does that give you any better rights to raise
10:48AM 10 the things you want to raise? I suggest it doesn't, but I'm happy
11 to try to be convinced.

12 MR. SMITH: Well, Your Honor, one of the problems that we
13 have had that I've mentioned is finding out what, in fact, is
14 going on in the case. Being a party as an intervenor would give
10:49AM 15 us more access to that information.

16 THE COURT: Well, I mean, what's going on in the case I
17 think is now contained in the four square document called the
18 settlement agreement that is being presented.

19 So Mr. Lingle (sic), Mr. Shaulson, relative the motions
10:49AM 20 to intervene, should they be denied? Denied as moot? Should I
21 rule on them?

22 Obviously, if I rule in your favor, I guess you're not
23 opposed to that, but -- I mean, Mr. Smith has suggested there
24 might be other rights that folks might have if they were
10:49AM 25 intervenors. I understand your argument that this is sort of the

1 second bite of the apple, having argued for consolidation before
2 the panel, and the Court should not sort of reopen this at this
3 stage, but --

4 MR. SMITH: Your Honor, might I ask if you would permit
10:50AM 5 Mr. Dostart to comment on the intervention motion issue?

6 THE COURT: Okay.

7 MR. DOSTART: Thank you, Your Honor.

8 THE COURT: How did you get here from California?

9 MR. DOSTART: Unfortunately for my girlfriend and myself,
10:50AM 10 I flew out yesterday. And she would be upset if I didn't do my
11 best up here, so I'm going to go ahead and --

12 MR. THOMAS: There's nothing like a Valentine's Day in
13 Rochester, New York.

14 THE COURT: We don't --

10:50AM 15 MR. SHAULSON: My wife wasn't happy that I was here
16 yesterday either.

17 THE COURT: You traveled across the country on the red
18 eye, but --

19 MR. SMITH: I want to point out you guys did this.

10:50AM 20 THE COURT: I digress. Go ahead, Mr. Dostart.

21 MR. DOSTART: Thank you, Your Honor. Going back to what
22 Jules mentioned regarding the potential exposure of Chase, the
23 reason that that's directly applicable to the hearing today is
24 because of a case called *D'Amato vs. Deutsche Bank*, which we cited
10:51AM 25 in our opposition to this hearing today, and the cite for Your

1 Honor is 236 F.3d 78 at --

2 THE COURT: That's in your papers?

3 MR. DOSTART: Correct, Your Honor, a Second Circuit case
4 from 2001. And what the Court held is that the District Court
10:51AM 5 should look at whether or not a proposed settlement is within the
6 range of possible approval.

7 And one factor that courts must consider is a potential
8 exposure of the client, and the reason that's important is because
9 once this train leaves the station here today, meaning if Your
10:51AM 10 Honor preliminarily approves the settlement, it's very difficult
11 for us to get information regarding the potential exposure of
12 Chase.

13 So, for instance --

14 THE COURT: What does exposure mean? You mean -- I
10:52AM 15 assume you don't mean just money in the bank? I assume you mean
16 the likelihood that plaintiffs might prevail and make more money?

17 MR. DOSTART: I'm sorry, Your Honor, yes, that's
18 precisely correct. Let me explain that in more precise terms.

19 What we mean by "potential exposure" is if all of the
10:52AM 20 claims that Chase is purporting to release under their settlement
21 agreement were actually released, what the value of those claims
22 would be.

23 Now, given it's an estimate, and given that it's a very
24 rough approximation, that is still something that courts must
10:52AM 25 consider when preliminarily approving a settlement, the range of

1 exposure, and it's completely absent from the proposed settlement.

2 There's nothing in there about what sort of exposure
3 under the multitude of state law claims, and I'm primarily
4 concerned with the California state law claims.

10:53AM

5 THE COURT: Why can't you tell me all that at the
6 fairness hearing? I mean, lay out all your objections at that
7 point?

10:53AM

8 MR. DOSTART: For one very simple reason, Your Honor: We
9 do not have the facts to make an evaluation of this settlement
10 because of the dearth of information in the preliminary
11 approval -- preliminary settlement documents. There's nothing in
12 there.

10:53AM

13 All we know is that there's 5,200 class members; it's a
14 \$42 million settlement; and there's a bunch of claims being
15 settled. That's all we know.

10:54AM

16 We have no idea of the number of underwriters in
17 California; of the potential exposure of their state law claims,
18 which we have alleged, and which were not alleged or litigated in
19 the *Davis* or *Whalen* case.

20 Your Honor, there's simply no way for us to make an
21 evaluation for our class members as to whether or not it's fair
22 and they should opt-in or opt-out. We have no way to tell them or
23 advise them as to what's fair because there's nothing in their
24 papers.

10:54AM

25 THE COURT: Well, it sounds like you think you have some

1 right to wade in and engage in discovery and do all the things
2 that Mr. Thomas and Mr. Shaulson have been doing here, which
3 doesn't seem to be --

10:54AM 4 MR. DOSTART: Your Honor, I do not want to appear, nor
5 are we seeking, to ruffle feathers. All we would like to do is
6 get discovery as to the California individuals: The work weeks in
7 California; the number of employees in California; and the
8 exposure that Chase -- meaning the amount of money that Mr. Thomas
9 and Chase have estimated the claims may be worth -- for the
10:55AM 10 California claimants.

11 That's all we need. It's very limited discovery. I do
12 not think it would take more than four weeks. I'm sure it's
13 already been done by Chase, we hope, for this preliminary approval
14 hearing today. It's just not in the papers.

10:55AM 15 THE COURT: And you haven't done any of that in your
16 separate lawsuit?

17 MR. DOSTART: We've tried, but it's very difficult
18 because Chase has been making motions to dismiss our case. And we
19 entered into a stipulation to stay it in light of the MDL's
10:55AM 20 hearing and in light of today hoping that I could come to Your
21 Honor and ask Your Honor to allow us to get that information.

22 We think it would be most efficient if Your Honor
23 permitted us to obtain that information as opposed to having to
24 litigate the case in the Central District of California in front
10:55AM 25 of Judge Carter and ask for it there. There's really a lot of --

1 THE COURT: So if I grant it for you, I should grant it
2 for the *Cole* people down in the City, and the *Ebert* people in
3 Texas, and probably a bunch of others that might pop up?

4 MR. DOSTART: No, Your Honor. And the reason why the
10:56AM 5 answer to that is no is because, number one, there are only --
6 just to clarify a little bit of the water here, there are really
7 only the *Cole* case, which is ours, and the reason that we're here
8 today is because of California.

9 Then there's the *Pickle* case, and the *Pickle* case has a
10:56AM 10 New York class representative, which Mr. Thomas has already
11 litigated in front of Your Honor for a decade, and then a
12 California class representative. We and the *Pickle* plaintiffs are
13 aligned in that, we care about the California class.

14 The *Ebert* case is in Texas. Texas does not have state
10:56AM 15 rights that provide for greater or enhanced recovery under the
16 FLSA. So there really is not a need for the *Pickle* -- for the
17 *Ebert* plaintiffs to have any further discovery.

18 So the end result of that is that the only two states
19 that are represented by any party in this action that provide for
10:57AM 20 enhanced recovery are New York, which has a six year statute of
21 limitations for wage claims, which Mr. Thomas has litigated; and
22 California, which I am here today to protect.

23 MR. THOMAS: We have litigated California as well, we've
24 litigated them at a national level, and the issues at the state
10:57AM 25 level are also being resolved.

1 THE COURT: Let Mr. Dostart finish --

2 MR. THOMAS: Sorry.

3 THE COURT: -- then you can.

4 MR. DOSTART: And one potential problem that we see with
10:57AM 5 this proposed settlement is that there is no California class
6 representative.

7 Any time a nationwide case is settled for states that
8 have laws that are far superior to the federal laws, it's
9 important that they're adequately represented. And the
10:58AM 10 Second Circuit held in *Super Spuds*, which is a funny name of a
11 case, but an important case, that you cannot settle state law
12 claims if there's not a class representative that has those
13 claims.

14 Now, for the first time today, Your Honor, Mr. Thomas
10:58AM 15 has represented to Your Honor that he has litigated California
16 claims, although in the fifth amended complaint filed Friday at
17 9:00 p.m. Eastern Time, there's no California class representative
18 and there's never been a California class representative in any of
19 the other four prior complaints.

10:58AM 20 As far as we know, Your Honor, it may have been
21 discussed in mediation in front of Mr. Michael Dickstein, but it
22 was not litigated, and the claims were not alleged, in fact, in
23 front of Your Honor because as Your Honor has stated, it was
24 litigated on an individual test plaintiff basis with what we
10:59AM 25 understand New York State law and the federal law being the two

1 most important claims alleged, which in turn, Your Honor, brings
2 me to my motion to intervene, which I think does need to be ruled
3 on.

4 The motion to intervene is really -- if you look at that
10:59AM 5 motion in terms of addressing the standing issue that Your Honor
6 raised this morning and then again into the substantive issue as
7 to the discovery that we've requested, it's very important, we
8 believe, that it be addressed because we do have standing as
9 California claims are being settled, and substantively we need
10:59AM 10 further discovery whether it's simply Chase providing the work
11 weeks, the number of California employees or some limited amount
12 of discovery regarding California, but we do think that the motion
13 to intervene does need to be addressed.

14 MR. THOMAS: Your Honor?

11:00AM 15 THE COURT: Brief response.

16 MR. THOMAS: Briefly, it's clear the reason they want to
17 intervene is to conduct discovery. That opens the flood gates to
18 everyone. They will say I have claims under FLSA, state law,
19 whatever, that needs to be looked at.

11:00AM 20 As you made clear in the intervention papers, discovery
21 is not permitted for class settlements. The Manual For Complex
22 Federal Litigation makes that clear, the cases make that clear and
23 obviously it's got to be the rule because as Your Honor
24 identified, if you're allowed discovery regarding a class
11:00AM 25 settlement, then all you do is just relitigate the case again and

1 again and again and again to test adequacy and fairness.

2 So I think on its face their request to intervene for
3 discovery is totally inappropriate and shows where they're going,
4 and it's just not correct.

11:01AM 5 There will be the settlement agreement that needs to be
6 supported at the approval hearing, they will have a chance to
7 object, as will everyone else at the same time, and all of these
8 issues can be handled at that point.

9 And I just -- at this stage the class needs to know
11:01AM 10 what's going on; they will get the notice. And instead of
11 scrambling the egg now, let's save it until the final approval
12 hearing when we can deal with these issues all at one time and can
13 be carefully briefed and worked out.

14 MR. DOSTART: One final thing regarding the notice, Your
11:01AM 15 Honor, that I failed to mention earlier, and that is simply the
16 importance of the notice.

17 Mr. Nelson is saying that the notice needs to get out as
18 quickly as possible, but they seven months ago announced that this
19 case was settled, did nothing or filed nothing in the intervening
11:01AM 20 seven months, and now are saying that the notice needs to be
21 ordered to go out on two business days' notice to parties that
22 have been excluded from the settlement from over a year and a half
23 ago.

24 And as far as the discovery goes, we're not asking for
11:02AM 25 unfettered discovery. It's simply three things: The number of

1 employees in California; the average workweek in California; and
2 the average salary in California. That's it.

3 MR. SHAULSON: Your Honor, if we could just come back to
4 a very basic point? And that is the MDL heard from all the
11:02AM 5 parties, and the MDL said the appropriate remedy is to address all
6 of these issues before Your Honor at the final hearing at the
7 final approval process. Any order other than that would be
8 plaintiffs attempt or *Cole* plaintiffs attempt to do an end run
9 around the MDL order.

11:02AM 10 THE COURT: All right, I think we've covered that.

11 I'm not sure I brought all the papers out on the bench.
12 Do I have the proposed notice here? The proposed notice?

13 MR. SHAULSON: Yes, Your Honor.

14 MR. DOSTART: Proposed notice is in the exhibit.

11:03AM 15 THE COURT: I assume it is. I just --

16 MR. SHAULSON: Yes.

17 THE COURT: What exhibit is it?

18 MR. THOMAS: Here you go, Your Honor, here's the --

19 THE COURT: Is it in the papers?

11:03AM 20 MR. THOMAS: It is in the papers. It's Exhibit --

21 MR. SHAULSON: Yes, it's Exhibit 2.

22 THE COURT: To what? Mr. Thomas's affidavit or --

23 MR. SHAULSON: I believe so. I think it's Exhibit A, and
24 then Exhibit 2 as part of Exhibit A, I believe.

11:03AM 25 THE COURT: Looks like I do have it up here.

1 THE CLERK: You don't.

2 THE COURT: I don't have it up here. Well, this is the
3 order, not the notice. Well, if you say it's in the papers, I
4 believe you. I just --

11:04AM 5 MR. DOSTART: Your Honor, if you'd like, we're happy to
6 discuss some of the deficiencies in this notice.

7 THE COURT: Let me ask another question here, which I
8 think sort of may not be directly relevant, but if the Court were
9 to grant intervention, would you be seeking an application for
10 attorney's fees as part of the settlement?

11 MR. DOSTART: To be completely honest, Your Honor, I do
12 not know the answer to that. However --

13 MR. THOMAS: To be completely honest, I do know the
14 answer to that, Your Honor.

11:04AM 15 THE COURT: Well, come on, one at a time. I assume you
16 didn't travel here across the country just to enjoy our weather?

17 MR. DOSTART: Well, unfortunately, that's a little above
18 my pay grade. I'm a paid associate of the firm. The partner is
19 Jim Dostart, and that's my father. My name is his last name, but
11:05AM 20 I'm an associate, I work for Jim, and so I'm paid regardless of
21 whether or not I win here today or not.

22 So what I can tell you is that I do care about the
23 people in California that whose rights are being affected today.
24 And I can tell Your Honor that if limited intervention for the
11:05AM 25 sole purpose of discovery into the California class members'

1 claims that are being extinguished --

2 THE COURT: Let me try to -- I mean, if you were allowed
3 intervention, leaving aside issues of largess, wouldn't you be
4 entitled to seek fees?

11:05AM 5 MR. DOSTART: I think the way it works, Your Honor, is
6 that -- and this has happened to me. I've been in Mr. Thomas'
7 shoes where an individual comes in and asks to be part of the
8 settlement and has a right that's being affected, and intervention
9 is granted and that person seeks attorney's fees.

11:06AM 10 The way I've seen it work is that, for example, Your
11 Honor grants intervention, the parties determine that California
12 underwriters are effectively releasing claims worth five times
13 that of underwriters in other states per individual on a relative
14 basis.

11:06AM 15 Chase then says, well, it looks like these Cole
16 plaintiffs are right, we should increase the settlement from
17 42 million to 45 million. Then there is a difference in what was
18 originally agreed to and what was later agreed to, and then we
19 would ask for attorney's fees from that difference.

11:06AM 20 If it turns out that Mr. Thomas and Chase have
21 adequately provided for every claim that they're extinguishing
22 here today, then our clients would simply opt-in to the settlement
23 and there would be no -- there would be no application for
24 attorney's fees.

11:07AM 25 THE COURT: Okay.

1 MR. THOMAS: Your Honor, I do think attorney's fees and
2 discovery are the reason for the intervention. They have rights
3 as intervenors, but I think the other thing to keep in mind is the
4 settlement.

11:07AM

5 Mr. Dostart has referred several times to claims being
6 extinguished, his clients being extinguished. All of his clients
7 have the right to opt-out. If he thinks he can go get a better
8 deal -- which he won't and we can explain why, but if his clients
9 think they can get a better deal in California and he wants to get
10 attorney's fees on that, he wants to have discovery on that, he's
11 totally free to do that.

11:07AM

12 They will only stay in this case if he likes the deal.
13 If he thinks he can get a better deal elsewhere, he can. So
14 there's no extinguishment of rights, and that's the reason there's
15 no need for intervention because he can take everyone he currently
16 represents and go represent them in California, get all the
17 discovery he wants, do whatever he wants. There is nothing -- no
18 need for discovery here, and there's nothing being extinguished.

11:07AM

19 MR. DOSTART: That is not true, Your Honor, we don't know
20 the deal.

11:08AM

21 MR. THOMAS: The deal is -- the deal is out there.

22 THE COURT: Read it.

23 MR. DOSTART: We don't know how -- what's allocated to
24 the California class members. We don't have the right to
25 discovery in our case because -- we've stated why in today's

11:08AM

1 hearing.

2 MR. THOMAS: There's a very clear formula on how things
3 are allocated to California, which is in the settlement agreement.

4 We have also pulled all of the firm's agreements from
11:08AM 5 Mr. Clapp's cases. We're providing a better recovery for his
6 clients in California.

7 THE COURT: Whose case?

8 MR. THOMAS: Mr. Clapp's, his --

9 MR. DOSTART: My boss.

11:08AM 10 MR. THOMAS: His boss. All of his law firm's cases we
11 have pulled. They're getting a better recovery under the terms of
12 this deal in terms of the California multiplier and the California
13 recovery then any settlement that he's ever gotten for his
14 clients.

11:08AM 15 MR. DOSTART: That's not true, Your Honor. I've looked
16 at those terms as --

17 MR. THOMAS: I'll be glad to raise those later. This is
18 the whole reason this is not the time to get into this.

19 THE COURT: All right, all right, okay. I think I've
11:09AM 20 heard enough, but I'll give each of you about four minutes to say
21 anything else you want to say. I'm going to reserve, I'm not
22 going to rule from the bench here today, except for one item.

23 I do have a bevy of people waiting here for other
24 matters. I think the issues are pretty clear to me. I don't
11:09AM 25 think it would be prudent just to rule from the bench, except for

1 one matter. So I will reserve, but I'll give you all a brief
2 chance.

3 Mr. Shaulson, anything briefly you want to put forth
4 that we haven't covered and you don't think is in the papers?

11:09AM

5 MR. SHAULSON: I'll just say one thing, Your Honor, and
6 that is the Manual For Complex Litigation and the cases that cite
7 it repeatedly say there is a chilling effect on settlements,
8 particularly class settlements, where discovery is sought by
9 proposed intervenors, and so the courts deny intervention for

11:10AM

10 purposes of seeking discovery unless the proposed intervenors can
11 show collusion on the part of the parties to the settlement.

12 And having litigated this case for ten years before Your
13 Honor, I can say that this is -- there's no evidence of collusion.

14 Mr. Thomas and I have fought every issue in this case leading up

11:10AM

15 to the very last dotting of the I and crossing of the T on the
16 settlement agreement. It was a hard fought fight, and absent
17 evidence of real collusion on the part of us, they're entitled to
18 no discovery.

19 THE COURT: All right, thank you.

11:10AM

20 Mr. Smith and/or Dostart?

21 MR. DOSTART: I would just say, Your Honor, that the
22 notion that we must prove collusion in order to be permitted to
23 limited intervention for a limited purpose and be provided limited
24 discovery is not true. There does not have to be any proof of
25 collusion.

11:11AM

1 As our motion to intervene states, we have alleged that
2 our representation, meaning California class members' interests
3 representation in this lawsuit, is adequate. That allegation in
4 and of itself is enough to meet our burden of proof regarding our
11:11AM 5 intervention of right.

6 As to the notice, I believe that it's insufficient for
7 many reasons, but one important reason is that it does not give
8 the best possible recovery that the plaintiffs could have
9 received. In other words, what percent of the total amount of the
11:11AM 10 recovery that they could have gotten are they settling for? And
11 it's very important that California class members know what rights
12 they have that they might be waiving in this settlement.

13 Chase reclassified all of their underwriters as
14 non-exempt in February of 2009. There are two years of
11:12AM 15 off-the-clock claims that are being settled in this lawsuit that
16 were never litigated. It's important that California underwriters
17 know what rights they're extinguishing.

18 That's all I have, Your Honor.

19 THE COURT: There are 49 other states, too. You can make
11:12AM 20 the same statement about many of those that have state law labor
21 statutes as well.

22 MR. DOSTART: And I've done -- I've looked at nationwide
23 class action settlements and I can tell you, Your Honor, that
24 there are very few states -- New York, California, Illinois and
11:12AM 25 maybe two or three others -- that have more favorable laws than

1 the federal laws.

2 And in this lawsuit the only state that is here today
3 asking Your Honor for limited discovery and for a right to be
4 heard is California.

11:13AM 5 THE COURT: All right, thank you.

6 Last word, Mr. Thomas.

7 MR. THOMAS: Yes, Your Honor. The Federal Rules of Civil
8 Procedure set up a clear process by which settlements are
9 approved. If the parties reach a settlement agreement, the absent
11:13AM 10 class members are entitled to know about it and to comment on it
11 if it is something within the general range of reasonableness,
12 which this certainly is.

13 And I will echo Mr. Shaulson's comments: This case was
14 far from collusive. I will say Mr. Shaulson, although always
11:13AM 15 extremely ethical, is the most difficult, obstreperous defense
16 counsel I've ever been against.

17 MR. SHAULSON: In a nice way. I think he means that in a
18 nice way.

19 THE COURT: He told me the same thing about you.

11:13AM 20 MR. THOMAS: He, in fact, said something like that to me
21 on the phone the other day. I said, well, if you're telling me
22 that, then I will take that as a supreme compliment.

23 THE COURT: You've been before me enough, I know it's
24 true.

11:14AM 25 MR. THOMAS: He's worse. But this has been a very

1 difficult, long fought out battle. There is nothing wrong with
2 the notice. The idea that you need to put in the total potential
3 recovery, total potential recovery, I've never seen that in any
4 class notice. I can't believe that would ever be required, much
11:14AM 5 less how you calculate something like that.

6 Assuming the worse case scenarios of worse case
7 scenarios, I don't think that's helpful information for a class
8 member. There's nothing wrong with the notice. The other cases
9 shouldn't be mentioned. Total settlement amount doesn't need to
11:14AM 10 be mentioned.

11 The rest of the issues, they're putting the cart before
12 the horse. There will come a point in time where they can object.
13 If at the objection stage they feel they didn't have enough
14 information, they can put that in as an objection if that's
11:14AM 15 correct. It won't be, but they can opt-out or do that.

16 Now is not the time or place to do this. The notice is
17 fair and reasonable. It is not the time to solicit comments from
18 absent class members, particularly after the MDL has ruled the
19 appropriate approach now is for them to come in as objectors, and
11:15AM 20 they will have plenty of chance. I'm sure we'll hear all this
21 stuff again at that point.

22 THE COURT: Two things. Let me ask Mr. Dostart or
23 Mr. Smith: If the Court were to give you leave to raise
24 objections or comments relative to the notice only, how much time
11:15AM 25 would you need to do that?

1 MR. DOSTART: Seven days, Your Honor.

2 THE COURT: Okay. Mr. Swartz has weighed in with a
3 letter, and I guess we can notify him, but I don't know if you all
4 sort of work with him or not?

11:15AM 5 MR. DOSTART: We've been in contact with one of the firms
6 that is part of the *Pickle* case.

7 THE COURT: Well, I guess that shouldn't be your burden.
8 We'll notify Mr. Swartz.

9 I think whether or not the proposed intervenors have a
11:16AM 10 right to be heard relative to the notice, the Court has to make
11 sometimes tough decisions, and certainly not pro forma decisions,
12 as to what the notice should contain.

13 And I don't think there's anything improper about
14 getting input on that, so I will allow Mr. Dostart and
11:16AM 15 Mr. Smith -- not multiple objections, but one objection.

16 We will notify Mr. Swartz of that same opportunity and
17 ask that that be submitted -- you say seven days. How about,
18 let's say, ten days?

19 MR. DOSTART: Ten days, yes, Your Honor.

11:16AM 20 THE COURT: And then should plaintiff and the bank wish
21 to respond, do you want to do ten days after that?

22 MR. THOMAS: That's fine, Your Honor.

23 MR. SHAULSON: That's fine, Your Honor.

24 MR. THOMAS: I know Your Honor is going out of town.

11:17AM 25 THE COURT: That's all right, stuff gets sent to me.

1 MR. THOMAS: Okay, fine. We will certainly put that --
2 put those in.

3 THE COURT: Is ten days enough?

4 MR. THOMAS: Ten days is plenty.

11:17AM 5 THE COURT: All right.

6 MR. SMITH: I wonder what day of the week that is?

7 THE COURT: I can't tell you everything, Mr. Smith.
8 Today is the 15th.

9 MR. SMITH: Today is the 15th.

11:17AM 10 THE COURT: So I don't care. Like by Friday the 25th?

11 MR. SMITH: That's fine. I just didn't want it to be
12 like on a Sunday and it really just cuts time out.

13 THE COURT: Tell me now if you want more time, but ten
14 days?

11:17AM 15 MR. SMITH: That's fine, Your Honor. The 25th is fine.
16 Thank you.

17 THE COURT: Then the response, let's say, by March the
18 11th. Let me just make a note of that, notice only.

19 And we are -- our office will contact Mr. Swartz and
11:18AM 20 allow him to weigh in. That should be all the submissions.

21 I guess I would ask counsel, Mr. Thomas and
22 Mr. Shaulson, keeping in mind that it appears that there will be
23 some issues raised about the fairness hearing, what's your
24 guesstimate as to whether we should set this two months from now,
11:18AM 25 three months from now, four months from now? I think we have to

1 build in some time.

2 MR. THOMAS: Your Honor, there was a proposed schedule
3 that we sent in which builds in time for objections and for time
4 for a response, but it's multiple months out. I think even
11:18AM 5 without the time now being added on to comment on, we were looking
6 at June or July. So there will be plenty of time.

7 THE COURT: Help me again. Is this in a proposed order?

8 MR. THOMAS: Yes.

9 THE COURT: All right.

11:19AM 10 MR. THOMAS: And I can --

11 MR. SHAULSON: It's in the proposed order, and all the
12 dates adjust based upon the preliminary approval date.

13 THE COURT: So it's so many days or weeks or months from
14 the approval date?

11:19AM 15 MR. SHAULSON: Correct.

16 THE COURT: Okay. Well, it seems like we usually set
17 these out three or four months to allow notice to be prepared and
18 time to respond and --

19 MR. THOMAS: When does Your Honor envision having a
11:19AM 20 ruling on the notice? Because we could try to get a new schedule
21 to set those dates from there.

22 THE COURT: I don't know. Depends how --

23 MR. THOMAS: Fast moving trains.

24 THE COURT: -- how lengthy your papers are and -- pretty
11:19AM 25 promptly.

1 MR. THOMAS: Okay.

2 THE COURT: So, I mean, if I need your assistance in
3 seeing if you can agree on dates, I'll let you know. Otherwise,
4 I'll just plug in some dates.

11:19AM

5 MR. THOMAS: Your Honor, maybe what we could do is we'll
6 assume -- we could assume a preliminary approval by April 1st and
7 then set new dates and send that in to Your Honor as a proposed
8 schedule?

9 THE COURT: Don't presume anything.

11:20AM

10 MR. THOMAS: Fine, we'll wait to get the preliminary
11 approval and go from there.

12 THE COURT: Yeah, and -- I mean, I think before me I'm
13 reserving on the motion for preliminary approval; I'm reserving on
14 the nature of the notice; and I'm reserving on the motions to
15 intervene, and hope to decide them all.

11:20AM

16 MR. SMITH: Thank you, Your Honor.

17 MR. DOSTART: Thank you, Your Honor.

18 MR. SHAULSON: Thank you, Your Honor.

19 MR. THOMAS: Thank you, Your Honor.

11:20AM

20 THE COURT: All right, thank you, gents. Have safe trips
21 back.

22 (WHEREUPON, the proceedings adjourned at 11:21 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript to the best of my ability of the record of proceedings in the above-entitled matter.

S/ Christi A. Macri
Christi A. Macri, FAPR-RMR-CRR-CRI
Official Court Reporter